SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
MAR 13 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 982

NICHOLAS A. STIRONE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LLOYD F. ENGLE, JR.,
1312 Frick Building,
Pittsburgh, Pa. 15219,
Attorney for Petitioner.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD F. SHANNON, REPRESENTATIVE,
8083 CARLYN DRIVE, PITTSBURGH 36, PA 681-7463

INDEX.

PAGE

Opinions Below 1

Basis of Jurisdiction 2

Questions Presented for Review 3

Provisions of Law Involved 4

Statement of the Case 4

Arguments and Reasons Why the Writ Should Be Granted 6

POINT I. Petitioner was deprived of his right of due process by the absence of the Trial Judge during a portion of his trial 6

POINT II. Petitioner was deprived of his statutory rights and his right to a full record by the failure of the Court Reporter to record portions of the proceedings 10

POINT III. Petitioner was deprived of his constitutional right to trial by an impartial jury and of his statutory rights by the failure of the Trial Judge to follow the provisions of Rule 24(a) of the Federal Rules of Criminal Procedure, Title 18 United States Code, pertaining to the examination of prospective jurors 12

POINT IV. The procedures of the District Court and the Court of Appeals has effectively suspended the privilege of the Writ of *Habeas Corpus* 16

Conclusion and Summary 18

Appendix A—Opinion of the Court, McLaughlin, Circuit Judge 20

Appendix B:

Constitution of the United States:

Article 1, Section 9, Clause 2 28

Amendment V 28

PAGE

Amendment VI 28

Title 28 United States Code, Section 735(B) 29

Title 18 United States Code, Federal Rule of Criminal Procedure 24(a) 30

Local Rule 19 of the United States District Court for the Western District of Pennsylvania 30

Certificate of Service 31

TABLE OF CASES.

Ex parte Baez, 177 U. S. 378, 44 L. Ed. 813, 20 S. Ct. 673 16

Crawford v. United States, 212 U. S. 183 .....13, 19

In re: Eskay, 38 F. Supp. 221 (D. C. N. J. 1941) ... 8

[illegible]y v. Noia, 372 U. S. 391, 83 S. Ct. 822, 834 17

Haith v. United States, 330 F. 2d 198 (C. A. 3) 9

Moore v. State, 46 Ohio App. 433, 188 N. E. 881 (1933) 9

Parrott v. United States, 314 F. 2d 46 (C. A. 10) 10

Patton v. United States, 281 U. S. 276, 50 S. Ct. 253 .. 8

Poole v. United States, 250 F. 2d 396 (C. A. D. C. 1957) 10

Quercia v. United States, 289 U. S. 466, 53 S. Ct. 698, 77 L. Ed. 1321 (1933) 8

Stephens v. United States, 289 F. 2d 308 (C. A. 5, 1961) 11

Townsend v. Sain, 372 U. S. 293, 9 L. Ed. 2d 770, 83 S. Ct. 745 (1963) 17

United States v. Taylor, 303 F. 2d 165 (C. A. 4, 1962) . 11

Van Buskirk v. Wilkinson, 216 F. 2d 735 (C. A. Wash. 1954) 16

Wilhite v. Agbayani, 2 Ill. App. 2d 29, 118, N. E. 2d 440 8

STATUTES.

Act of 1679 (31 Charles II) 16

Court Reporter Statute 10

Hobbs Act (18 U. S. C. 1951) 6

Title 18 United States Code, Federal Rule of Criminal Procedure 24(a) 2, 4, 12, 13, 14, 18, 30

Rule 43 8

Title 18 United States Code, Section 1951 4

PAGE

Title 28 United States Code, Federal Rule of Civil Procedure No. 75(h) 5
Rule 47(a) 12, 13
United States Code, Title 28, Section 1254(1) 2
Section 753(b) ...2, 4, 10, 29
Section 2255 .....3, 6, 9
Section 2243 .....16, 17

CONSTITUTION.

United States Constitution:
Fifth Amendment 2, 4, 13, 18, 28
Sixth Amendment 2, 4, 13, 18, 28
Article 1, Section 9, Clause 2 .....3, 4, 17, 28

RULES.

Federal Rules of Criminal Procedure 3
Local Rule 19 of the United States District Court for the Western District of Pennsylvania ...4, 12, 15, 18, 30
Supreme Court Rule 19, paragraph 1(b) 2

MISCELLANEOUS.

Federal Practice and Procedure, by Barron and Holtzoff, Volume 2B, page 320, Section 1031 .....12, 13
Trial Jurors in Federal Criminal Cases, 29 F. R. D. 43, by Lester B. Orfield, Professor of Law at Indiana University and member of the United States Supreme Court Advisory Committee on Rules of Criminal Procedure 12

IN THE

Supreme Court of the United States

.....Term, 1965

No. .....

NICHOLAS A. STIRONE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Nicholas A. Stirone, prays that a writ of Certiorari be granted to review the Judgment of the United States Court of Appeals for the Third Circuit affirming the Judgment of the United States District Court for the Western District of Pennsylvania denying Petitioner's Motion to Vacate Sentence.

Opinions Below

The Opinion of the United States Court of Appeals for the Third Circuit, a copy of which is annexed hereto as Appendix A, the same not having been reported in any volume of the official reports.

The Opinion of the United States District Court for the Western District of Pennsylvania, which is reported in 222 Federal Supplement 507 and is also contained in the printed Record of the Court below. A certified copy of said Record accompanies the within Petition.

Basis of Jurisdiction

The Judgment of which review is sought is that of the United States Court of Appeals for the Third Circuit which was dated and entered on February 11, 1965.

The jurisdiction of your Honorable Court is invoked pursuant to the provisions of the United States Code, Title 28, Section 1254(1) and Supreme Court Rule 19, paragraph 1(b) for the reasons that the District Court and the Court of Appeals have deprived Petitioner of his right of due process, as guaranteed by the Fifth Amendment to the Constitution, in that the said Courts have permitted and sanctioned the absence of any tribunal during a portion of Petitioner's trial. The District Court and the Court of Appeals have deprived Petitioner of his statutory rights and his right to a full record, as provided by the United States Code, Title 28, Section 753(b), in that said Courts have permitted and sanctioned the failure of the court reporter to record and transcribe a portion of the proceedings. The District Court and the Court of Appeals have deprived Petitioner of his right to trial by an impartial jury, as guaranteed by the Sixth Amendment to the Constitution, and his statutory rights, as provided by Federal Rule of Criminal Procedure 24(a), Title 18 United States Code, in that said Courts have permitted and sanctioned the conducting of the examination of the prospective jurors by a deputy clerk. The District Court and the Court of Appeals have so construed and proceeded

under Title 28, Section 2255 of the United States Code as to violate the rights guaranteed by Article 1, Section 9, Clause 2 of the Constitution in that Petitioner has not been afforded an expeditious determination of the legality of his detention nor has he been produced at any hearing in an attempt to resolve the serious factual dispute comprised in the period of absence of the Trial Judge.

In all of these areas, the District Court and the Court of Appeals have decided important questions which have not been, but should be settled by your Honorable Court. Further, the departures from proper judicial procedures by the District Court, and the sanction thereof by the Court of Appeals, have been so substantial as to require the exercise of the powers of supervision which reside in your Honorable Court.

Questions Presented for Review

I. Was not Petitioner deprived of his right of due process by the absence of the Trial Judge during a portion of his trial?

II. Was not Petitioner deprived of his statutory rights and his right to a full record by the failure of the court reporter to record certain portions of the proceedings?

III. Was not Petitioner deprived of his constitutional right to trial by an impartial jury and statutory right by the failure of the Trial Judge to follow the provisions of the Federal Rules of Criminal Procedure pertaining to the examination of prospective jurors?

IV. Has not the procedure of the District Court and the Court of Appeals effectively suspended the Privilege of the Writ of *Habeas Corpus*?

Provisions of Law Involved

The provisions of the Constitution, Statutes and Rules involved in this case are set forth in the Appendix hereto in the following order: United States Constitution, Article 1, Section 9, Clause 2; United States Constitution, Amendment V; United States Constitution, Amendment VI; Title 28 United States Code, Section 753(b); Title 18 United States Code, Federal Rule of Criminal Procedure 24(a); United States District Court for the Western District of Pennsylvania, Local Rule 19.

Statement of the Case

On October 2, 1961, the trial in the case of the United States of America vs. Nicholas A. Stirone, at Criminal Action No. 14871 in the United States District Court for the Western District of Pennsylvania, began at 10:00 o'clock A. M. before the Honorable Joseph P. Willson. Mr. Stirone was present in open court with his then counsel, when Judge Willson advised all present that Miss Barr, a deputy clerk, would conduct the *voir dire* examination. Thereafter, Judge Willson left the court room and returned at approximately 12:30 P. M., after the jury had been selected. Neither the Trial Judge, defense counsel nor the United States Attorney conducted any portion of the *voir dire* examination of the prospective jurors.

During the entire period of the *voir dire* examination, the exercise of challenges and the selection of the jury, there was either no court reporter present or, if present, the court reporter did not take notes or record any of the proceedings.

Upon a verdict of guilty on the indictment under Title 18 United States Code, Section 1951, the Court passed sen-

tence on October 6, 1961, consisting of imprisonment for a period of ten years and a fine of $10,000.00.

On July 30, 1963, a Petition to Vacate Sentence was filed in the Trial Court and a hearing was scheduled thereon for September 10, 1963. Serious factual disputes existed, which pertained to the period of time during which the Trial Judge was absent, but the Trial Court refused to permit the presence of the prisoner. On October 7, 1963 the Trial Court handed down an Opinion, Findings of Fact and Conclusions of Law. On October 10, 1963, an Order, signed only by James H. Wallace, Jr., Clerk was filed denying the Petition to Vacate Sentence. On December 4, 1963, present counsel for Petitioner entered his appearance and filed the Notice of Appeal to the United States Court of Appeals for the Third Circuit at No. 14758, his previous counsel having advised Petitioner that he would no longer represent him.

In an effort to resolve the aforementioned factual dispute, which was apparent from the record, this counsel undertook an investigation wherein some twenty-three persons throughout the Western District of Pennsylvania who were known to have been in the court room, were interviewed. On the basis of the matters discovered therein, and the affidavits given by some of those persons, counsel prepared a Motion to Correct the Record under Title 28 United States Code, Federal Rule of Civil Procedure No. 75(h). Said Motion was finally permitted to be filed in the Trial Court on February 27, 1964, only after counsel had been required to seek and had obtained, under opposition from the United States Attorney, permission from the United States Court of Appeals for the Third Circuit to file said Motion. Hearing on this Motion was scheduled for April 3, 1964, at which time the Trial Court denied the Motion. The prisoner was not present at that hearing.

After the Appendix and Appellant's Brief were filed in the United States Court of Appeals for the Third Circuit, the United States Attorney moved that Court for an extension of thirty days from June 5, 1964 in which to file the Brief of the United States Government. After opposition to such proposed extension and oral argument thereon, the United States Court of Appeals for the Third Circuit, by Order dated June 16, 1964, granted the United States Attorney such extension to and including July 6, 1964.

Argument of the Appeal before the United States Court of Appeals for the Third Circuit was had on September 15, 1964. On February 11, 1965, approximately five months after argument, the Court of Appeals filed its Opinion affirming the judgment of the District Court.

Petitioner is presently incarcerated in the United States Penitentiary at Terre Haute, Indiana, having commenced the service of his sentence in April, 1963.

Jurisdiction of the Federal Courts, in the first instance, is found in the provisions of the Hobbs Act (18 U. S. C. 1951), under which the prisoner was indicted and in the provisions of Title 28 U. S. C. Section 2255.

ARGUMENTS AND REASONS WHY THE WRIT SHOULD BE GRANTED

POINT I

Petitioner was deprived of his right of due process by the absence of the Trial Judge during a portion of his trial.

On presentation of this case to your Honorable Court the serious issue of fact remains unresolved; to-wit, wheth-

er or not the Trial Judge was present during any part of the *voir dire* examination and the selection of the jury. As a result of the investigation conducted by present counsel, many persons have stated unequivocally, as shown by the affidavits contained in the Motion to Correct the Record, that the Trial Judge was not present at any time during the *voir dire* examination or the selection of the jury. Also, the Trial Judge has taken three different positions on this question; First, at the time of the hearing on the Motion to Vacate Sentence conducted September 10, 1963, the Trial Judge tacitly admitted that he was not present by not denying the statement to that effect as made by Petitioner's then counsel; Second, the Trial Judge, in that same proceeding, made a statement regarding his usual practice; and Third, the Trial Judge, in his Opinion dated and filed October 7, 1963, categorically stated that he was present during the entire *voir dire* examination and left the bench only for the period while the challenges were being made. From the record of the proceedings had on April 3, 1964, it is clear that the Trial Judge is not inclined to consider any evidence in an effort to resolve this issue.

Of all of the persons questioned, the deputy clerk, Miss Barr, is the only person who "categorically" stated that the Trial Judge was present during the entire *voir dire* examination. As to this statement, it must be remembered that, at the position where all persons placed Miss Barr in the court room, her back was to the bench while she questioned the prospective jurors who were seated in the spectator seats in the rear of the court room.

A trial commences when the jurors are called for examination as to their qualifications. If this were not true, there would be no meaning to Rule No. 43 of the Federal

Rules of Criminal Procedure, Title 18 United State Code, which requires:

> "The Defendant shall be present at the arraignment, *at every stage of the trial including the impaneling of the jury* and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these Rules." (Emphasis supplied)

This matter has been considered and it has been so held in the case of *Wilhite vs. Agbayani,* 2 Ill. App. 2d 29, 118 N. E. 2d 440.

The Trial Judge has the duty to assure the proper conduct of the *voir dire* examination and the challenges, both for cause and peremptory. If the judicial officer is absent, there is no duly constituted court. In the case of *In re: Eskay,* 38 F. Supp. 221 (D. C. N. J. 1941), it is stated, at page 223:

> "* * * (I)t is impossible to have a duly constituted court if the judicial officer is absent."

The function of a Trial Judge in a criminal case is stated in *Quercia vs. United States,* 289 U. S. 466, 53 S. Ct. 698, 77 L. Ed. 1321 (1933) as follows:

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law."

The absence of the Trial Judge, at any stage of the proceedings, deprived Petitioner of his right to a duly constituted court and a proper trial by jury. In *Patton vs. United States,* 281 U. S. 276, 50 S. Ct. 253, the United States Supreme Court defined trial by jury as follows:

> "That it means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted, is not open to question. Those elements were: (1) that the

> jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the attendance of a judge having power to instruct them as to the law and advise them in respect of the facts and (3) that the verdict should be unanimous."

In the case of *Haith vs. United States*, 330 F. 2d 198 (C. A. 3), Haith had already brought one motion under Title 28 United States Code, Section 2255, in which the matter of the absence of the Trial Judge had not been raised. On subsequent motion, when it was raised, the District Court summarily dismissed on the basis that Haith knew this at the time of the first motion and could have raised it. Chief Judge Biggs, speaking for the Court at page 200, states:

> "The ground referred to is contained in the allegation that a Judge was not present when a jury which tried Haith was selected. We are concerned with that ground because of the words used by Mr. Justice Brennan in the last paragraph quoted above from the Sanders Opinion."

It is interesting to compare the position of the Court in the Haith case to that of the same Court in the instant case as shown by the Opinion of that Court and the concurring Opinion of Chief Judge Biggs, set forth in the Appendix to this Petition, in which Opinions this delinquency is cursorily brushed aside and, in footnote, the cautionary chastisement is given, to the effect that the Trial Court shall never again so proceed.

In the case of *Moore vs. State*, 46 Ohio App. 433, 188 N. E. 881 (1933), it appeared that, at the trial, the Defendant and the State's Attorney stipulated that, during the argument to the jury, the judge could leave the court room to prepare the instructions and that no exceptions would be taken. On appeal, the Court held:

> "The absence of the Trial Judge from the court room during a portion of the argument referred to we regard as error. It was stated by the present Chief Judge, on another case, that 'the Trial Judge is not merely a part of the Court, an important part of the Court, the controlling part of the Court, but he is an essential part of the Court. While he is present the Court is in session until adjournment; but his absence from the court room at any time disintegrates the Court * * *' ".

The fact that there was no duly constituted Court during a portion of Petitioner's trial deprived him of due process of law.

POINT II

Petitioner was deprived of his statutory rights and his right to a full record by the failure of the Court Reporter to record portions of the proceedings.

The Court Reporter Statute, Title 28 United States Code Section 753(b), was enacted by Congress to fill a long-felt need for a verbatim record of all court proceedings, particularly in criminal cases. The case of *Poole vs. United States,* 250 F. 2d 396 (C. A. D. C. 1957) is authority for the proposition that it is the duty of the District Court to see that court reporters comply with the Court Reporter Statute and take down and record all parts of the criminal trial.

In accordance with the presentment set forth hereinbefore, Petitioner submits that the *voir dire* examination is an essential part of the criminal trial and, accordingly, should be taken down, transcribed and filed by the Court Reporter. Petitioner further submits that the Court Reporter Statute, especially in criminal trials, is mandatory and that the Court has the duty to require compliance. See *Parrott vs. United States,* 314 F. 2d 46 (C. A. 10).

Again, it is interesting to compare the decisions in the aforementioned cases and the mandatory language of the Court Reporter Statute with the Opinion of the Court of Appeals and the concurring Opinion of Chief Justice Biggs, set forth in the Appendix to this Petition, wherein this delinquency is also cursorily brushed aside and there is cautionary chastisement in footnote that, henceforth, there shall be compliance with the terms of the Statute.

In *United States vs. Taylor*, 303 F. 2d 165 (C. A. 4, 1962), it is stated, at page 169:

> "The provisions of Section 753(b) are designed to preserve a correct and authentic record of criminal proceedings free from the infirmities of human error and they provide a safeguard to which not only the Court but also the Defendant is entitled in the preservation of his rights. See Stephens vs. U. S., 5 Circ., 289 F. 2d 308. We do not mean to hold that the failure to keep complete records of the criminal proceedings is of itself an error that can be raised by a Motion to Vacate Sentence under Section 2255 but we are of the opinion that it is a matter which may be considered in a collateral proceeding in determining whether a Defendant is entitled to a hearing on a Motion to Vacate Sentence and in determining whether the sentence should be vacated."

In the case of Stephens vs. United States, 289 F. 2d 308 (C. A. 5, 1961), it is stated:

> "The Act is mandatory in its requirements, and it has been held that its very purpose was to satisfy 'the long-felt need for a verbatim record of all court proceedings, particularly in criminal cases * * *.'
>
> "Since the failure of the court reporter to observe the terms of the statute is undisputed, and the result is that a full transcript is not available to us, we do not see how we can, under Rule 52(a), F. R. Cr. P., 18 U. S. C. A., adjudicate that there was no showing that any errors which might have been reflected by the transcript were harmless."

POINT III

Petitioner was deprived of his constitutional right to trial by an impartial jury and of his statutory rights by the failure of the Trial Judge to follow the provisions of Rule 24(a) of the Federal Rules of Criminal Procedure, Title 18 United States Code, pertaining to the examination of prospective jurors.

In the treatise entitled *Trial Jurors in Federal Criminal Cases*, 29 F. R. D. 43, by Lester B. Orfield, Professor of Law at Indiana University and member of the United States Supreme Court Advisory Committee on Rules of Criminal Procedure, there is set forth a complete tabulation of suggestions received from learned and practical contributors and the historical development of Rule 24(a) of the Federal Rules of Criminal Procedure, Title 18 United States Code. An examination of the subject treatise clearly shows that at no time did the Advisory Committee or any contributor give even the most remote potential of acceptability to the practice of some administrative clerk conducting the *voir dire* examination. The said Rule 24(a) is set forth in the Appendix to this Petition.

In the Trial Court, the *voir dire* examination, conducted by a deputy clerk, was performed under Local Rule 19 which is also set forth in the Appendix to this Petition.

Rule 57(a) of the Federal Rules of Criminal Procedure, Title 18 United States Code, prohibits the abrogation of the Federal Rules of Criminal Procedure by any Local Rules. It should also be noted that Rule 47(a) of the Federal Rules of Civil Procedure, Title 28 United States Code, is, for all practical purposes, identical with Rule 24(a) of the Federal Rules of Criminal Procedure, Title 18 United States Code. In the publication entitled *Federal*

Practice and Procedure, by Barron and Holtzoff, Volume 2B, page 320, Section 1031, in discussing Rule 47(a) of the Federal Rules of Civil Procedure, it is stated:

> "Considerable discretion is lodged in a District Court as to the examination of prospective jurors. The Rule vests the Trial Judge with the choice of himself examining prospective jurors on *voir dire,* or permitting counsel to do so, or combining the two methods. The first of the three courses is generally regarded as preferable as in the interest of both fairness and expedition."

The due process clause of the United States Constitution (Amendment V) requires an impartial tribunal and the Sixth Amendment of the United States Constitution requires an impartial jury. Both of the aforesaid amendments are set forth in the Appendix to this Petition. If adequate provisions for determining the background, qualifications and prejudices of the prospective jurors are not afforded the Petitioner or his then counsel, how can an "impartial jury" be selected to perform its function in an "impartial tribunal" which was not, in fact, even in existence when the "impartial jury" was being picked?

In *Crawford vs. United States,* 212 U. S. 183, there was a specific statute (since amended) providing that certain employees of the United States could not have their names placed on jury lists. The conviction of Crawford was reversed, even though objection was not properly made at the time, because two members of the jury fitted within this prohibition. Without question, such a statute is merely a general supplement to the constitutional requirement for an impartial jury and it takes general cognizance of the fact that certain salaried employees of the United States may be prejudiced in its favor.

Under the purview of Rule 24(a) of the Federal Rules of Criminal Procedure, Title 18 United States Code, and

the supplemental Rules prohibiting the abrogation thereof, there is no authority for any other person, particularly an administrative clerk, to interrogate the jurors in a criminal trial. The failure of the Trial Court to follow this Rule in the impaneling of the jury was a denial of due process to Petitioner.

The information which is developed by a proper *voir dire* examination is of extreme importance to Defendant and his counsel for the purpose, not only of developing challenges for cause, but, also, for the purpose of obtaining sufficient information and background as to the prospective jurors to permit counsel to exercise the peremptory challenges intelligently. The Opinion of the Court of Appeals, set forth in the Appendix to this Petition, would have it that no claim of harm to Petitioner is alleged as regards the scope of the *voir dire* examination as it was limited by Local Rule 19 in this case and failed to comply with Rule 24(a) of the Federal Rules of Criminal Procedure, Title 18 United States Code. If it should be determined that it is necessary for Petitioner to show harm and prejudice in that regard, particularly in light of the complete absence of a record of proceedings at that point, as was presented in the Brief of Petitioner and in the record transmitted to the Court of Appeals, the important and almost sinister aspect of the colloquy, which occurred at pages 386 and 387 of the transcript of the trial of Petitioner at Criminal Action No. 14871, becomes apparent. It is there transcribed:

> "The Court: All right, Court will recess. The jury retire.
>
> "(Whereupon the jury retired from the courtroom to begin their deliberations at 12:07 o'clock, p. m.)
>
> "(At 4:30 o'clock, p. m., the following proceedings were had in chambers:)
>
> "The Court: Gentlemen, the jury has asked, sent down a question, and the question reads:—I want you fellows to see it—'Sir, the consciences of two members

of the jury are bothered. Will you or can you talk with them?'

"This is off the record.

"(Whereupon there was a discussion had off the record).

"The Court: Counsel—on the record—agree that that's the answer, what I have indicated is the answer?

"Mr. Krouse: Yes.

"Mr. Casey: Yes.

"(In open Court.)

"The Court: Members of the jury, I have got the question which you wrote me, and which was sent to me by the bailiff and Mr. Lynch. I have shown it to counsel.

"I want to say, and not in criticism of the jurors at all, but it is your problem. I can't help it. You have heard the evidence; you have heard the summations; you have heard the charge of the Court. That problem is up to you to resolve. It is just as short and quick as that, but that is all there is to it. The answer is 'no.' I can't help you.

"The jury will retire and resume your deliberations."

What is meant by the statement in the foregoing colloquy, "the consciences of two members of the jury are bothered?" Is not this the indication of some circumstance which would have been disclosed upon a *proper voir dire examination?* If disclosure had been made, might not these jurors have been disqualified or, at least, so characterized that an intelligent peremptory challenge could have been exercised? What did Miss Barr ask the prospective jurors? Did she stick to the rubber stamp, uninformative questions of Local Rule 19? The answers to these questions shall never be known because of the concurring failure of the court reporter to record the proceedings.

POINT IV

The procedures of the District Court and the Court of Appeals has effectively suspended the privilege of the Writ of *Habeas Corpus*.

The *Habeas Corpus* procedure, as we know it today, developing from the Act of 1679 (31 Charles II), has been designed to afford speedy relief to an illegal detention. The expedited determination which is built into the present *Habeas Corpus* procedures is as much a part of the "privilege of the Writ of *Habeas Corpus*" as is the Writ itself. Under the provisions of Title 28 United States Code, Section 2243, limited time requirements are provided. The ordinary time elapsing from the date of application for the Writ to the date of hearing would be eight days and, even under the most exceptional circumstances, where good cause for additional time were shown, the total time would be twenty-five days. It is further required that "the Court shall summarily hear and determine the fact, and dispose of the matter of law and justice require."

It was the intention of Congress that *Habeas Corpus* should be a speedy remedy and that there should be no procrastination or trifling with the Writ. The time limitations in our present day procedures are similar to those set forth in the Act of 1679 (31 Charles II), which Act had for its specific purpose the putting an end to abuses of the Writ from the standpoint of time lapse. See *Ex parte Baez*, 177 U. S. 378, 44 L. Ed. 813, 20 S. Ct. 673.

It is also clear that the application for Writ of *Habeas Corpus* is entitled to special, preferential consideration to insure expeditious hearing and determination. See *Van Buskirk vs. Wilkinson*, 216 F. 2d 735 (C. A. Wash. 1954).

Under our present day procedures on application for Writ of *Habeas Corpus*, as pertains to the existence of issues of fact, it is required by Title 28 United States Code, Section 2243 as follows:

> "Unless the application for the Writ and the return present only issues of law the person to whom the Writ is directed shall be required to produce at the hearing the body of the person detained."

All evidence which is crucial to an adequate consideration of a constitutional claim must be developed in the *Habeas Corpus* proceeding. See *Townsend vs. Sain*, 372 U. S. 293, 9 L. Ed. 2d 770, 83 S. Ct. 745 (1963).

It has been stated, many times, that the Motion procedure to Vacate Sentence is a substitute for *Habeas Corpus*. However, as the Motion procedure has been afforded Petitioner, with the failure to produce the prisoner in the face of a serious factual issue, the continuation of that factual issue as an open question in the record of this case and the serious and unseemly delays which have been occasioned in these proceedings, the Motion procedure has effectively suspended the "privilege of the Writ of *Habeas Corpus*". In this regard, the constitutional rights of the Petitioner as guaranteed by Article 1, Section 9, Clause 2 of the United States Constitution, which is set forth in the Appendix to this Petition, have been violated as effectively as if the Court had taken no action upon his Motion. In order for any procedure to function as a substitute for the Great Writ, it must afford every essential of the relief and guarantees of the Writ. Otherwise, it violates Article 1, Section 9, Clause 2 of the Constitution in its application, its substance or both.

In the case of *Fay vs. Noia*, 372 U. S. 391, 83 S. Ct. 822, 834, the Supreme Court expressed the rationale behind

the language in prior decisions and virtually sums up the entire history of the Great Writ as follows:

> "* * * *habeas corpus* cuts through all forms and goes to the very issue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell."

If, as in the words of the Supreme Court, such inquiry is opened where every form has been preserved, it should be clear that the empty shell of the Motion procedure is, indeed, transparent where every form has been perverted.

Conclusion and Summary

Petitioner has been denied due process and the existence of an impartial tribunal during, at least, a portion of his trial in violation of the Fifth Amendment of the United States Constitution. Petitioner has been denied the protection of his rights by the failure to make a full and complete record of the proceedings in violation of the Court Reporter Statute. Petitioner has been denied his right to trial by an impartial jury in violation of the Sixth Amendment of the United States Constitution by the failure of the Trial Court to abide by Rule 24(a) of the Federal Rules of Criminal Procedure and the abrogation of Rule 24(a) by the Trial Court's adherence to Local Rule 19. All of the foregoing violations and deprivations concurred in point of time and operated adversely to affect the life and liberty of Petitioner.

The United States Attorney has argued, the United States District Court for the Western District of Pennsylvania has held and the United States Court of Appeals for the Third Circuit has fostered that holding to the effect that the then counsel for Petitioner should have ob-

jected to these delinquencies. In opposition to this obvious effort to pass off these serious omissions to comply with basic and essential requirements, it is offered that these inadequate practices have been extant in the Western District of Pennsylvania for at least the last twenty-one years. The foregoing is fully established by the discussions had between Petitioner's trial counsel and the Trial Judge as set forth in the transcript of the proceedings on September 10, 1963 which is contained in the Record accompanying this Petition. Certainly, this, in itself, raises exceptional circumstances which should excuse the failure of trial counsel to raise objection. Where the total environment is error, the error appears acceptable.

In *Crawford vs. United States,* 212 U. S. 183, Mr. Justice Peckham, speaking for the unanimous Court, stated at page 194:

> "In criminal cases courts are not inclined to be as exacting with reference to the specific character of the objection made, as in civil cases. They will, in the exercise of sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception. Wiborg vs. U. S., 163 U. S. 632, 659."

Respectfully submitted,

LLOYD F. ENGLE, JR., ESQUIRE,
1312 Frick Building,
Pittsbugh, Pennsylvania 15219,
Attorney for Petitioner.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14758

NICHOLAS A. STIRONE,

Appellant,

v.

UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued September 15, 1964

Before Biggs, Chief Judge, and McLaughlin and Staley, Circuit Judges.

OPINION OF THE COURT

(Filed February 11, 1965)

By McLAUGHLIN, *Circuit Judge.*

This case is before us for the third time. After the conviction of the defendant for extortion under the Hobbs Act (18 U. S. C. 1951) which we affirmed on appeal, the Supreme Court reversed on the ground that evidence be-

yond the scope of the indictment had been admitted into evidence. The matter was remanded to the district court for a new trial. Appellant's brief would have it that appellee errs in saying that the second trial was under the same indictment. According to appellant, "* * * the Supreme Court actually held that indictment to be null and void." In fact the appellant was again tried under the original indictment and on October 6, 1961, again convicted. This court affirmed the conviction at 311 F. 2d 277 (1962) and the Supreme Court denied certiorari, 372 U. S. 935 (1963). The mandate from this court was filed in the district court on April 25, 1963 and the defendant was committed to the custody of the United States Marshal in accordance with the court's order of the same date. It was not until July 30, 1963, that a petition to vacate sentence under 28 U. S. C. 2255, was filed in the district court. Appellant's attorney was the same one who had represented him at the first trial, on appeal from that conviction and on the second trial and appeal from its result.

The petition claimed that defendant had not been afforded due process of law because:

> "The trial judge was not present at any time during the impaneling or selection of the jury and therefore did not, pursuant to Rule 24 of the Rules of Criminal Procedure, interrogate the prospective jurors on their *voir dire* or permit counsel to do so.
>
> "7. The selection of the jurors and their *voir dire* occurred in open court in Courtroom No. 6 but the proceedings relating to the selection of the jury were not reported by an official court reporter as required by the Act of Congress, 28 U. S. C. 753B, nor was any court reporter present in the courtroom during the selection and interrogation of the prospective jurors."

There was a hearing on the petition before the district court. It is conceded that the trial jury was selected in

open court. The trial transcript shows that the judge opened court and that in response to his inquiry both counsel said they were "ready". Two attorneys on behalf of the Government were admitted specially for the trial. Then the judge said:

> "The Court: All right. All right, gentlemen, proceed with the selection of the jury. As is customary and routine here, Miss Barr will handle the proceedings. There are some 40 jurors back there, I take it, and you all know your challenges. You will proceed. If any questions come up, why, I am right here available."

There was no reportage of the *voir dire* by the stenographer. The latter was in court. The judge thinks he remained present throughout the *voir dire* but the stenographer's place in the courtroom is, as the court says in the opinion, "* * * not generally visible to the trial judge unless he leans forward and checks to see whether the reporter is actually taking shorthand notes or operating the stenotype machine." There is no pretension that the reporter was not available in the courtroom in event there was any dispute during the *voir dire*. There was no dispute or objection either as to the method of taking the *voir dire* or with reference to any part of the *voir dire* itself. The judge asked counsel for the appellant "You didn't make any objection at any time?" The attorney, a trial lawyer of many years experience in the district court and who was one of the Bar Committee who had drafted Rule 19 of the district[1] under which juries, includ-

[1] Rule 19 reads:

"Examination of Jurors Before Trial.

"During the examination of jurors before trial, the Clerk, or the representative of the Clerk, conducting such examination shall state to the jurors the name and residence of each of the parties and the nature of the suit, and then the following questions, where appropriate, shall, *inter alia*, be put to each juror:

(Footnote continued on following page)

ing the one at bar, where drawn, clearly indicated that he had made no objection whatsoever to the method of the jury selection or any part thereof. The judge states in his opinion:

> "As trial judge I will categorically state that in the instant case I was present during all of the *voir dire* which was conducted by Deputy Clerk Barr. However, when the *voir dire* was completed and counsel commenced making their challenges I left the bench and went to my adjoining chambers some twelve steps away. During the period that counsel were making their challenges, I was not on the bench."

The court had commented at the hearing:

> "My practice in criminal cases has been, before and since the Stirone trial, to preside on the bench during the *voir dire* and until the peremptory challenges are made. I am satisfied that that is what I did in the Stirone case. I have a distinct memory of the *voir dire* examination. Possibly that is so because the selection of the jury went so smoothly."

Appellant would have it that the asking by the deputy clerk instead of the judge himself or counsel as called for by Fed. R. Crim. P. 24(a), of the six standard questions called for by the local Rule 19 and a seventh, presumably agreed to by the attorneys in accordance with the rule, was substantial error. No claim of harm to the appellant is alleged; no claim that the attorney who helped formulate the very rule was prevented from urging the incident as a

---

(Footnote continued from preceding page)

(a) Do you know any of the parties?
(b) Do you know any of the attorneys in the case, or have they represented you or any member of your family?
(c) What is your present occupation?
(d) Who is your employer?
(e) What is the occupation of your husband (wife), and who is his (her) employer?
(f) Are you, or any member of your family, stockholders in any of the corporate parties?
(g) Any other question, which in the judgment of the trial judge, after application being made, shall be deemed proper."

point on appeal. This is not denial of a jury trial. It is at most a technical error resulting in no harm whatsoever to appellant and completely acquiesced in on his behalf. The defense attorney knowledgeably used the carefully worked out formula for jury selection his own Bar Committee had prepared. Hill v. United States, 328 U. S. 424 (1962).

It is also asserted that the absence of the judge from the bench during a portion of the selection of the jury was to the substantial prejudice of the defendant. The judge was present during the *voir dire*. He left the bench during the later peremptory challenges but was within not more than thirty feet of the bench at that time. There was no fuss by or between counsel as to this stage of the jury selection process. There was no occasion to summon the judge. There was no objection by either side. The absence of the judge during the peremptory challenges, and we are entirely satisfied from the circumstances and the law that this was the only instance where he was off the bench,[2] was definitely with the implied assent of both counsel. Affirmative assent was not necessary under the trial situation. Lack of mention of the incident throughout the trial, motion for new trial or on appeal makes this certain. And it cannot be brushed aside later by a lawyer of twenty-one years experience in the same type of jury litigation in the very same court, making the amazing assertion that he had no responsibility in the matter whatsoever. There was an acceptable waiver of the presence of the judge during the part of the jury empanelment when he was absent.[3] That would seem to have been part of the defense

[2] Rule 75(h) Fed. R. Civ. P. See Clawans v. White, 112 F. 2d 189 (D. C. Cir. 1940), cert. den. 311 U. S. 646 (1940).

[3] Even if there had been no waiver of the judge's presence during the peremptory challenges that would be no ground for relief in a Sec. 2255 proceeding. The mere absence of the judge for a short time, without a showing or

(Footnote continued on following page)

sharply defined low key trial theory and practice which was persevered with throughout the trial, new trial motion and appeal through denial of certiorari by the United States Supreme Court. In view of all that and where everything upon which the defense had really relied had failed, appellant cannot at this stage elect to pursue a course which he not only rejected at all levels of this litigation but which was not a true part of it ever. Johnson v. United States, 318 U. S. 189, 201 (1943); Patton v. United States, 281 U. S. 276, 288-289 (1930).

The remaining point urged is with reference to the failure of the stenographer to take the *void dire*. He should have, in accordance with 28 U. S. C. 753(b).[4] But at most, from the unescapable facts, not doing so was a harmless error. Nothing occurred during the *voir dire* to the detriment of the defendant. The lack of a transcript covering it was never suggested as damaging any defense point either for a new trial or on appeal. There is no accusation even in this late collateral suit that there was error of any kind in the *voir dire* examination itself or that the failure of the stenographer to record the *voir dire* resulted in substantial error. Addison v. United States, 317 F. 2d 808, 811 (5 Cir. 1963), cert. den. 376 U. S. 905 (1964). The facts in Hardy v. United States, 375 U. S. 277 (1964) differ radically from those in this appeal. That decision

---

(Footnote continued from preceding page)

allegation of prejudice is not reversible on direct appeal itself. Heflin v. United States, 125 F. 2d 700 (5 Cir. 1942), cert. den. 316 U. S. 687 (1942). It follows that in this collateral proceeding that type of absence is of no substance.

In fairness to the trial judges of this circuit, hereafter in criminal cases irrespective of suggestion of waiver by the parties, trial judges will not leave the bench during any part of the *voir dire* or other jury selection process without recessing the court.

[4] Court Reporters of this circuit will note that the Court Reporters Act, 28 U. S. C. 753(b) demands full compliance with its terms. In this particular instance that means that in criminal cases all phases of the jury selection, including the *voir dire*, will be recorded by the reporter.

has no controlling application here. *Cf.* United States v. Sigal and Rabinovitz, ___ F. 2d ___ (3 Cir. 1965).

Beyond all doubt we are dealing with what were in their context, minor procedural mistakes. These were accepted by the defense and at the very least, caused it no damage. The stated reasons for never before making the objections urged in this 2255 petition are frivolous. As in Sunal v. Large, 332 U. S. 174 (1947) effort is made to magnify the errors to constitutional proportions. Palpably there is not a shadow of genuine merit to them individually or collectively. They were not questioned at the trial, on the new trial motion thereafter or on appeal. If it had been deemed advisable to assert those incidents, the defense had every opportunity to do so. As said in Sunal, pp. 183-184, "They did not use it. And since we find no exceptional circumstances which excuse their failure, *habeas corpus* may not now be used as a substitute." In United States v. Sobel, 314 F. 2d 314, 322-323 (2 Cir. 1963), the court carefully analyzing 28 U. S. C. 2255, concluded " * * * —in all likelihood too favorably for appellant, and without qualifications which may well be needed in other factual settings—that he should have relief under Section 2255 if he has shown (1) a significant denial of a constitutional right even though he could have raised the point on appeal and there was no sufficient reason for not doing so * * * or (2) a defect seriously affecting his trial, even though not of constitutional magnitude, if it was not correctible on appeal or there were 'exceptional circumstances' excusing the failure to appeal, * * *." Applying those tests to appellant in this collateral attack on his conviction, he fails utterly to qualify for relief. See also Hill v. United States, 368 U. S. 424, 428 (1962).

The judgment of the district court will be affirmed.

BIGGS, *Chief Judge*, concurring.

As set out in the majority opinion there was no recording verbatim by shorthand or by mechanical means of the *voir dire* examination though a court reporter was in court while that examination was conducted. There was, therefore, no compliance with Section 753(b), Title 28 U. S. C. Had this failure been raised on appeal I would feel compelled to dissent as in the case of United States v. Sigal, — F. 2d — (1965), the opinions in which are filed concurrently with the opinions in this case, but the failure of the court reporter to record the proceedings at bar does not seem to me to rise to the dignity of a constitutional issue at least under the circumstances of the case at bar.

I am disturbed by the fact that the trial judge left the bench during the course of the peremptory challenges but no prejudice to the defendant could have resulted therefrom and if for a few moments jurisdiction of the cause was lost for this reason it seems to have been regained when the judge resumed his rightful position. I cannot deem the judge's temporary absence to be of sufficient importance to warrant a new trial.

A True Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix B

CONSTITUTION OF UNITED STATES

ARTICLE 1, SECTION 9, CLAUSE 2

Suspension of *habeas corpus*

The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

CONSTITUTION OF UNITED STATES

AMENDMENT V

Due Process

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

TITLE 28 UNITED STATES CODE, SECTION 753(b)

One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of court or by one of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall specifically agree to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding.

The reporter shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.

Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request. He shall also transcribe and certify all pleas and proceedings in connection with the imposition of sentence in criminal cases and such other parts of the record of proceedings as may be required by rule or order of court.

The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter shall be deemed *prima facie* a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records taken by the reporter.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

TITLE 18 UNITED STATES CODE, FEDERAL RULE OF CRIMINAL PROCEDURE 24(a)

Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

LOCAL RULE 19 OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Examination of Jurors Before Trial

During the examination of jurors before trial, the Clerk, or the representative of the Clerk, conducting such ex-

amination shall state to the jurors the name and residence of each of the parties and the nature of the suit, and then the following questions, where appropriate, shall, *inter alia*, be put to each juror.

(a) Do you know any of the parties?

(b) Do you know any of the attorneys in the case, or have they represented you or any member of your family?

(c) What is your present occupation?

(d) Who is your employer?

(e) What is the occupation of your husband (wife), and who is his (her) employer?

(f) Are you, or any member of your family, stockholders in any of the corporate parties?

(g) Any other question, which in the judgment of the trial judge, after application being made, shall be deemed proper.

Certificate of Service.

I certify that I have served five (5) copies of the foregoing Petition upon the Solicitor General by mailing same to him postpaid at the Department of Justice, Washington 25, D. C., and, further, that I have served copy of the foregoing Petition upon Gustave Diamond, United States Attorney, by mailing same to him postpaid at Federal Court and Post Office Building, Pittsburgh, Pennsylvania and, further, that I have served a copy of the foregoing Petition on Allen J. Krouse, Attorney, by mailing same to him postpaid at the Department of Justice, Washington, D. C. 20530.

Lloyd F. Engle Jr.

LLOYD F. ENGLE, JR.,
Attorney for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 982

NICHOLAS A. STIRONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 20–27) is reported at 341 F. 2d 253. The opinion of the district court (P.A. 23–37) [1] is reported at 222 F. Supp. 507.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1965. The petition for a writ of certiorari was filed on March 13, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "P.A." refers to petitioner's appendix in the court of appeals. "R." refers to the certified record.

770-211—65

QUESTION PRESENTED

Whether petitioner's conviction is open to collateral attack because of alleged irregularities during the selection of the jurors to which petitioner made no objection at the time.

STATEMENT

In October 1961 petitioner was convicted in the Western District of Pennsylvania of extortion in violation of the Hobbs Act (18 U.S.C. 1951).[2] He was sentenced to serve ten years in prison and to pay a fine of $10,000 (P.A. 5). After the court of appeals affirmed the conviction (311 F. 2d 277) and this Court denied certiorari (372 U.S. 935), petitioner filed a motion under 28 U.S.C. 2255 to vacate sentence, alleging that his trial was unfair because (1) the deputy clerk conducted the *voir dire* examination, (2) the trial judge was absent during the impaneling of the jury, and (3) the court reporter did not record the impaneling proceedings (P.A. 2–4). The district court heard argument, made findings of fact, and denied the motion (P.A. 23–37; 222 F. Supp. 507).

The transcript of petitioner's trial shows that the following occurred near the outset of the proceedings (P.A. 42–43):

> The COURT. All right. All right gentlemen, proceed with the selection of the jury. As is customary and routine here, Miss Barr [the deputy clerk] will handle the proceedings. There are some 40 jurors back there, I take it, and you all know your challenges. You will

[2] This Court reversed an earlier conviction under the same indictment. See *Stirone* v. *United States*, 361 U.S. 212.

proceed. If any questions come up, why, I am right here available.

(Whereupon a Jury was duly empanelled).

The COURT. All right. Swear the jury.

(Whereupon the Jury was duly sworn).

The district judge found, based on his own recollection, that during the unreported impaneling proceedings he was present on the bench while the deputy clerk asked the prospective jurors six questions as prescribed by the district court's Rule 19 (Pet. 30–31) and a seventh question proposed by the government. During the peremptory challenges, however, the judge retired to his chambers, a few steps away, where he remained available to resolve any difficulties that might arise (P.A. 14–15, 25, 28–30, 83–84). Petitioner's trial counsel, who was a member of the committee that drafted Rule 19 and who had practiced criminal law in the district court for 21 years, made no objection to the proceedings (P.A. 11–12, 16, 26, 31–34). Nor was objection made in petitioner's motion for a new trial or in his appeal from the conviction (P.A. 34–35) to the judge's absence, to the deputy clerk's conducting the proceedings, or to the failure of the reporter to record the *voir dire*.

Petitioner challenged the findings during the hearing and in a motion to correct the record under F.R. Civ. P. 75(h), in that he contended that the judge left the courtroom before the deputy clerk examined the jurors and was absent during the entire impanelment (P.A. 11, 50–76).[3] The judge, however,

[3] The motion to correct the record, filed after the appeal had been docketed in the court of appeals, asked the district judge to amend his finding of fact that he was absent only during

said that he would "categorically state that in the instant case [he] was present during all of the *voir dire*" (P.A. 25). He said that he had "a distinct memory of the *voir dire* examination. Possibly that is so because the selection of the jury went so smoothly" (P.A. 26).

While expressing disapproval of the practices of trial judges' leaving the bench during any part of the jury selection and of court reporters' failing to record the *voir dire,* the court of appeals ruled that on the facts of this case, in which petitioner made no objection and established no prejudice, the conviction could not be collaterally attacked (Pet. 20–27).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 6–10) that his sentence should be vacated because the judge was absent for a short time during the selection of the jury. The district court found that the facts did not support this claim, and petitioner has made an inadequate showing to impeach the judge's recollection.[4]

---

the peremptory challenges. The motion was supported by several affidavits of persons present during the trial, some saying that the judge was absent the entire time and others disclaiming any memory of the proceedings (see *e.g.*, P.A. 62, 68–69, 73).

[4] Since the trial judge's own recollection was—to use his own words—"absolutely clear" (P.A. 83), he could not credit the contradictory evidence that petitioner sought to introduce in support of a motion to correct the record pursuant to F.R. Civ. P. 75(h). Under Rule 75(h), when the moving party and the judge disagree over what occurred at the trial, and their only difference is one of recollection, the judge's version of the facts must prevail unless his version is shown to be arbitrary or fraudulent—a showing that has hardly been made in the present

In any event, the judge's absence did not present an issue cognizable under Section 2255. Petitioner had been represented by counsel who had practiced criminal law for 21 years in the district court. Counsel's failure even to mention the incident during the trial, in his motion for a new trial, and on direct appeal manifests conscious acquiescence in the judge's absence. Nor has petitioner shown any prejudice. The federal cases [5] uniformly hold that the presence of the judge can be waived, and his absence is not reversible error, even on direct appeal, unless prejudice is shown. *Haith* v. *United States*, decided March 1, 1965 (C.A. 3, No. 15091), affirming after remand 330 F. 2d 198; *Heflin* v. *United States*, 125 F. 2d 700 (C.A. 5), certiorari denied, 316 U.S. 687; *In re Eskay*, 122 F. 2d 819, 825 (C.A. 3) (dictum); *United States* v. *Sams*, 219 F. Supp. 164 (W.D. Pa.).

2. The court reporter had a statutory duty to record the *voir dire* examination (28 U.S.C. 753(b)), but even on direct appeal failure to record is not, *ipso facto*, reversible error. *E.g.*, *United States* v. *Sigal*, decided February 11, 1965 (C.A. 3, No. 14475); *Addison* v. *United States*, 317 F. 2d 808 (C.A. 5), certiorari denied, 376 U.S. 905; *Brown* v. *United States*, 314 F. 2d 293 (C.A. 9).[6] A conviction will not be reversed

---

case. *Clawans* v. *White*, 112 F. 2d 189 (C.A.D.C.) (per Rutledge, J.), certiorari denied, 311 U.S. 646; Moore's *Federal Practice* ¶ 75.15 (2d ed., 1964).

[5] The State cases, collected in 23 *Corpus Juris Secundum* § 972, are in conflict in their views on the presence of the judge.

[6] In the *Brown* case, the court remanded for a hearing under F.R. Civ. P. 75(h) to reconstruct the record. But that case has no application to petitioner, who has already reconstructed the record at the Section 2255 hearing in the district court.

on appeal unless a specific error has occurred that cannot be reviewed without a transcript. *E.g., Washington* v. *United States*, 327 F. 2d 793 (C.A. 5); *Parrott* v. *United States*, 314 F. 2d 46 (C.A. 10). Here petitioner can show neither prejudice nor error during the *voir dire*. *A fortiori*, failure to comply with the court reporter statute is not cognizable error on collateral attack. *United States* v. *Bebik*, 333 F. 2d 736 (C.A. 4); *United States* v. *Taylor*, 303 F. 2d 165, 169 (C.A. 4).

3. Assuming *arguendo* that the deputy clerk's reading the *voir dire* questions to the jury did not fully comply with F.R. Crim. P. 24(a), mere violation of a rule of procedure is not cognizable under Section 2255. *E.g., Hill* v. *United States*, 368 U.S. 424. Under local Rule 19 the deputy clerk was to read only the questions set forth in the rule itself, and such additional questions as were approved by the court. Hence her function was entirely ministerial and required the exercise of no discretion or judgment. Petitioner's trial counsel did not object, and petitioner's present claims of prejudice are too remote and speculative to be seriously considered.[7]

[7] Contrary to petitioner's final contention (Pet. 16–18), the normal delay inherent in the litigation process did not work a suspension of the writ of habeas corpus, particularly since most of the delay resulted from continuances obtained by petitioner (R. 1–5, 7–8, 17, 18–19, 22).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
THEODORE WIESEMAN,
Attorneys.

APRIL 1965.

U. S. GOVERNMENT PRINTING OFFICE : 1965